NO: 22-7071 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Elmer Dean Baker

Petitioner,

v.

Ron Neal

Warden of the Indiana State Prison

Respondent,

On Petition for Writ of Certiorari to

United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Elmer Dean Baker

Indiana State Prison

One Park Row

Michigan City, Indiana 46360

Petitioner - pro se

QUESTION(S) PRESENTED FOR REVIEW

Question One Preface: The Indiana Supreme Court ruled petitioner had a state required due process right to a unanimous jury verdict; then acquiesced he had been denied this right because the unanimity instruction his jury was given was fatally ambiguous; then ruled it was a harmless error; then superseded the jury's duty by directing a verdict for the state bases on evidence of crimes allegedly committed outside the state and Indiana court's jurisdiction.

Question One: Is it a denial of due process when a state imports a due process right and then acquiesces the defendant was denied this right and then arbitrarily takes it away by superseding the jury and directing a verdict for the state based on evidence of crimes allegedly committed outside the state and all the state courts jurisdictions.

Question Two: Does it violate due process of law and the proscriptions under the state and federal constitutions against ex post facto laws when the state is allowed to revive a previously expired statutorily commanded limitations deadline by making a newly enacted law retroactive when it was not a "watershed" law that was not constitutionally based?

Question Three: Does the Due Process Clause still require an adequate voir dire to identify unqualified jurors in the United States? Can a reviewing court impede a defendant the right to investigate constitutional violations of an inadequate voir dire and then deny his claim based on an inadequate investigation?

LIST OF PARTIES

✔ All parties appear in the caption of the case on the front page.

RELATED CASES

Baker v State, 922 N.E.2d 723, Indiana Court of Appeals, (Direct Appeal) (Judgment entered March 11, 2010).

Baker v State, 928 N.E.2d 890, Indiana Court of Appeals, (Direct Appeal) (Judgment entered June 28, 2010)

Baker v State, 948 N.E.2d 1169, Indiana Supreme Court, (Direct Appeal) (Judgment entered June 23, 2011)

Baker v State, 119 N.E.3d 230 Indiana Court of Appeals, Unpub. (PC-Appeal) (Judgment entered December 12, 2018)

Baker v State, Indiana Supreme Court, (PC-Appeal-18A-PC-354), Transfer Denied. (Judgment entered May 9, 2019)

Baker v. Warden, 2021 U.S. Dist. LEXIS 53338 (N.D. Ind.2021) (CAUSE NO. 3:19-CV-423-RLM-MGG) (Judgment Entered Mar. 22, 2021)

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Before: Chief Justice, Rush unpublished, 127 N.E.3d 224 (Ind. 2019), [transfer denied], (Appears at - App., Vol. 3- A.)

Before: Judges, Bradford, Bailey, J. and Brown, J. [Indiana Court of Appeals denial of Post-Conviction relief appeal]. Decision without published opinion. (Appears at - App., Vol. 3- B.)

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Before: Judges, Rucker, Shepard, C.J., Dickson, Sullivan and David, JJ., (Published at: *Baker v. State*, 948 N.E.2d 1169, (Ind. 2011). [Indiana Supreme Court Order Denying Direct Appeal]. (Appears at - App., Vol. 3- D.)

Before: Judges, Crone, Riley J., Vaidik J., [Indiana Court of Appeals Orders denying Direct Appeal]. (Published at: *Baker v State*, 922 N.E.2d 723; 928 N.E.2d 890, (Ind. App. Ct. 2010)). (Appears at - App., Vol. 3- E; F.)

Before: Dekalb County, Indiana Trial Court Judge, Carpenter. [Order Denying Motion to Correct Errors] on April 29, 2009. (Appears at - App., Vol. 3- G)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 21, 2022. (App. Vol. 1, p. 3,4). This Court has jurisdiction pursuant to 28 U.S.C. 1254. See: *Ayestas v Davis*, 138 S. Ct. 1080 (2018), "We may review the denial of a COA by the lower courts. *Id.* citing *Miller-El* v. *Cockrell*, 537 U. S. 322, 326-327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

Baker has been seeking relief on the issues herein continually and diligently throughout his collateral attack on his convictions, in the Indiana State Courts, Federal District Court and on to the United States Court of Appeals for the Seventh Circuit. As to Questions One (Unanimity) and Two (Ex Post Facto), shortly after trial Baker began arguing his claims on March 3, 2009 in a Motion to Correct Errors. As to Question Three (Inadequate voir dire) Baker began arguing his claims in 2012 when he was forced to proceed pro se seeking post-conviction relief in state court.

Baker's last efforts before this petition was on December 5, 2022 when he asked the United States Court of Appeals for the Seventh Circuit to reconsider his claims and their silent denial to issue certificates of appealability on his issues, See: (App. Vol. 1, p.p.5-21), which was denied on December 21, 2022, and 90 days from that date is March 21, 2023. On January 31, 2023 the District Court issued an Order to the court to send Baker copies of the record requested to prepare for this writ. (Received February 14, 2023) [Doc# 51] at (App. Vol. 1, p. 1, 2). Therefore this Honorable Court has the Jurisdiction/Authority to issue a Writ of Certiorari as to all questions argued herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION:

Article I, §10, cl 1 provides: No ex post facto law shall ever be passed.

Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment 14:

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INDIANA CONSTITUTION:

Article 1, § 13(a) provides: In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed;...).

Article 1, § 24 provides: No ex post facto law shall ever be passed.

Art. 3, § 1, provides: The power of the Government are divided onto three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

Art. 4, § 1, provides: The legislative authority of the State shall be vested in the General Assembly...The style of every law shall be enacted by the General Assembly ...; and no law shall be enacted, except by bill.

INDIANA STATUTES

I.C. § 35-42-4-3(a) (1)

I.C. § 35-42-4-3(b)

I.C. § 35-34-1-5 (1993)

I.C. § 35-34-1-5 (2007)

I.C. § 35-36-8-1(d)

OTHER

Indiana Public Law - 164-1993.

Indiana Public Law - 178-2007. [Appears at App. Vol. One. (F), page 63).

STATE OF THE CASE

On July 3, 2006, Baker was charged with allegedly committing two Class A Felonies, Count I and Count II in 2003. On December 18, 2006 Petitioner's Omnibus hearing set and held. On June 5-8, 2007 Petitioner's Jury trial ended in mistrial. On June 18, 2007 the State filed motion to amend for purpose of changing dates alleged in Counts I and II and adding new Count III, as a Class C Felony, which was alleged to have been committed in or about 2002. On July 9, 2007. Baker's counsel filed objection to motion to amend. On July 31, 2007 the trial Court granted motion to amend. Petitioner's charging information's all stated with specificity that he committed his crimes in one Indiana County (Dekalb). [Doc. 21-2, p. p. 23, 24, 2 4] Baker was charged pursuant to Indiana's single incident statutes,[1] but as to each count the state referenced a non-specific incident in the information and then introduced evidence of more than one incident as to each count that any juror might use as a basis for a vote of guilty, with the bulk of the improperly admitted incidents allegedly occurring outside the State of Indiana. On August 22, 2008, Petitioner's trial ended with a guilty verdict on all Counts as charged and he was given an aggregate 106 year sentence. The jury was not polled. Baker appealed raising the relevant issue that his verdicts were not supported by evidence of jury unanimity and allowing the amendment to his charges violated the ex post facto laws. After three years, on June

[1] I.C. § 35-42-4-3(a) (1); I.C. § 35-42-4-3(b).

23, 2011, Petitioner's Baker's appeal was decided by the Indiana Supreme Court {948 N.E.2d 1169}, (App., Vol. 3- D., p.p.29-41)

The Indiana Supreme Court ruled that the evidence did not support unanimity because, do to the facts of the case the general unanimity instruction Baker's jury had been given was "fatally ambiguous". In recognizing the unanimity concerns the facts of Baker's case presented, the Indiana Supreme adopted a new unanimity instruction to replace the general instruction given in Baker's trial and ruled it should have been given in Baker's case and in future fact similar cases to assure unanimity in their verdicts. The Indiana Supreme Court refused to apply the newly adopted instruction to Baker because his trial counsel had failed to anticipate a (three years after trial) change in the unanimity instruction law and pre-object accordingly. The Indiana Supreme Court ruled Baker being convicted of serious crimes by non-unanimous verdicts was a harmless error. The Indiana Supreme Court affirmed the Indiana Court of Appeals in their decision that allowing the late amendments to Baker's charges did not violate the ex post facto laws because Baker was not prejudiced. Baker raised his inadequate voir dire claims in post-conviction and subsequent appeal and along with his unanimity and ex post facto issues on Habeas to the District Court and to the Seventh Circuit Court of Appeals and this petition for writ of certiorari ensues. Baker has repeatedly petitioned for a C.O.A. as to all issue herein but the District Court and Court of Appeals all denied his requests by omission with no explanation and Baker repeatedly asked his appointed counsel to petition the court to expand his C.O.A. to include the issues herein. See: (App. Vol. Four)

[REASONS FOR GRANTING THIS PETITION]

The United States Court of Appeals for the Seventh Circuit has sanctioned a decision by the United States District Court, Northern District of Indiana, South Bend Division that conflicts with relevant decisions of this Court and divided decisions of Indiana State Court, as to call for an exercise of this Courts supervisory power to correct. The United States Court of Appeals for the Seventh Circuit and the United States District Court, Northern District of Indiana, South Bend Division has erroneously decided to ignore without explanations petitioner's requests for a certificate of appealability for the issues argued herein. Petitioner raises numerous due process violation that include being convicted of a non-existent crime, as well as, a jurisdiction violation that calls for an exercise of this Courts supervisory power to correct. See: *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986). ("...every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,...")

QUESTION ONE ARGUMENT:

This Honorable Court should grant this writ to consider the following questions:

(1) Can a state Supreme Court rule in their state, jury unanimity is a due process requirement and then arbitrarily deny a defendant this right?

(2) Can a fatally ambiguous unanimity instruction which gives a misdescription of

the evidence needed to find guilt beyond a reasonable doubt support a verdict?

(3.) Can a denial a given right to a unanimous jury verdict be declared a harmless error.

(4) Can a state Supreme Court direct a verdict for the state; based on evidence of crimes allegedly committed outside the state and the states jurisdiction?

(5) Can a conviction of a non-existent crime be upheld?

(6) Can a state procedural bar for failure to object be upheld if the defendant had no opportunity to object and the state otherwise uses the procedural bar arbitrarily?

(7) Should a certificate of appealability issue when state courts are divided on an issue?

Petitioner hopes the following will be instructive:

(1) In Baker, {948 N.E.2d 1169} the Indiana Supreme Court cited the following and specifically ruled that Jury unanimity is a requirement in the State of Indiana. *Taylor v State*, 840 N.E.2d 324 (Ind. 2006); *Fisher v State*, 291 N.E.2d 76 (Ind. 1973). (App., Vol. 3, p. 33); *Benson v. State*, 73 N.E.3d 198, 201 (Ind. Ct. App. 2017) cited *Taylor* and *Fisher* in holding jury unanimity is a requirement in the State of Indiana.

(2) Because, all Petitioner's counts were charged under single incident Indiana Statutes, but as to each count the state referenced a non-specific incident in the information and then introduced evidence of more than one incident as to each count that any juror might use as a basis for a vote of guilty--the Indiana Supreme Court

ruled Baker's verdicts were not a product of jury unanimity. The Court held this was so because the general unanimity instruction Baker's jury was given was "fatally ambiguous" because it gave a misdescription of the burden of proof required to convict under single incidents statutes. See the following Indiana Cases citing and commenting on the decision in Baker: *State v Sturman*, 56 N.E.3d 1187 (2016 Ind. App.),(Noting instruction in Baker was (fatally ambiguous); *Carter v State*, 31 N.E.3d 17 (2015 Ind. App.) explaining decision in Baker: ("The *Baker* Court held that such an instruction - which "did not advise the jury that in order to convict Baker the jury must either unanimously agree that he committed the same act or acts or that he committed all of the acts described by the victim and included within the time period charged" - was insufficient. *Baker*, 948 N.E.2d at 1178. *Id.* And see: *Giden v State*, 150 N.E.3d 654 (2020 Ind. App.) discussing the new rule announced in Baker: "Following *Castillo*, the Indiana Supreme Court decided *Baker v. State*, 948 N.E.2d 1169 (Ind. 2011). Citing *Castillo*, the Court held: "a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two or more underlying acts, either of which is in itself a separate offense, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense."" *Id.* and Baker at 1175.

The Indiana Supreme Court, in response to this recurring problem {948 N.E.2d 1175} researched the unanimity concerns found in Baker's case by searching solutions

from other states who had addressed the same problem.[2] After discussing how these other state courts had approached and addressed the unanimity problem found in Baker, the Indiana Supreme Court adopted a new unanimity instruction from the state of California which changed the description of the proof required to find guilt beyond a reasonable doubt in cases with facts similar to Baker's and ruled it should be given to future Indiana juries in fact similar cases, to assure future Indiana comparable cases did not suffer from the same non-unanimity in their verdicts as Baker had.

> "We adopt the reasoning of the California Supreme Court in Jones, supra and hold that the State may in its discretion designate a specific act (or acts) on which it relies to prove a particular charge. However if the State decides not to so designate, then the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged. See also *State v. Muhm*, 2009 SD 100, 775 N.W.2d 508, 520 (S.D. 2009) (adopting the *Jones* Court's formulation of the "either or approach"); *Thomas v. People*, 803 P.2d 144, 153-54 (Colo. 1990) (adopting the reasoning of the *Jones* Court)". {948 N.E.2d 1178}

At the close of Baker's direct appeal the Indiana Supreme Court held:

> [It] is clear that the foregoing instruction[3] did not advise the jury that in order to convict Baker the jury must

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[2] *Cooksey v. State*, 359 Md. 1, 752 A.2d 606 (Md. 2000); *R.L.G. v. State*, 712 So.2d 348, 356 (Ala. Crim. App. 1997); *State v. Fortier*, 146 N.H. 784, 780 A.2d 1243, 1249, 1250 (N.H. 2001); 101 Wn.2d 566, 683 P.2d 173, 178 (Wash. 1984); *Covington v. State*, 703 P.2d 436, 441 (Alaska Ct. App. 1985); *State v. Arceo*, 84 Haw. 1, 928 P.2d 843, 874-75 (Hawaii 1996); *People v. Jones*, 51 Cal. 3d 294, 270 Cal. Rptr. 611, 792 P.2d 643, 649 (Cal. 1990); *State v. Muhm*, 2009 SD 100, 775 N.W.2d 508, 520 (S.D. 2009); *Thomas v. People*, 803 P.2d 144, 153-54 (Colo. 1990) See: *Baker* at {948 N.E.2d 1176-78}

[3] The general unanimity instruction given at Baker's trial, "to return a verdict of guilty, you must all agree". (App., Vol. 3, p. 40)

> either unanimously agree that he committed the same act or acts or that he committed all of the acts described by the victim and included within the time period charged. {948 N.E.2d 1178}

(3) After ruling Baker had not received his given right to a unanimous verdict the Court ruled it was just a harmless error because the jury would have convicted him of any of the "various offenses" shown by the evidence. (App., Vol. 3, p. 41)

Structural errors are not subject to the harmless error analysis. The United States Supreme Court holds "structural errors," include the right to a unanimous jury verdict beyond a reasonable doubt, see *Sullivan v. Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993); *See: United States v Maez*, 960 F.3d 949 (7th Cir. 2020) citing *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) ("structural defects in the constitution of the trial mechanism ... defy analysis by 'harmless-error' standards") *Id.*

(4) The problem with the above theory is the bulk of those "various offenses" shown by the evidence to have been committed were alleged incidents committed outside the state of Indiana and any Indiana Courts jurisdiction and many were not concerning the elements needed to be proven to support Class A felonies. Also it is not in the providence of a reviewing court to direct a verdict for the state. ("Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence"). [508 U.S. 277-78].

When an appellate court concludes that a jury *would* surely have found the accused guilty beyond a reasonable doubt, the wrong entity judges the accused guilty which conclusion is not enough for *Sixth Amendment* purposes, as the *Sixth Amendment* requires more than an appellate speculation about a hypothetical jury's action. *Sullivan*, 508 US at 280, citing *Rose v Clark*, 478 US 570, *578*, 92 L Ed 2d 460, 106 S Ct 3101 (1986).

Neither, the trial court or the Indiana Supreme Court had the authority to supersede the jury and convict Baker because the bulk of the "various offenses" shown by the evidence to have been committed {948 N.E.2d 1178} that the Indiana Supreme Court wrongly convicted him with, [508 U.S. 277-78] were allegedly committed outside the State of Indiana and both court's jurisdiction: in the States of Illinois around Chicago, Ohio around Cincinnati, Wisconsin, West Virginia, Indiana, Michigan, Georgia" [See arguments by Baker at [Doc.13-17,p.p.32-36,60,61,71,72]; [Doc. 21,p.32],and should not have even been heard by the jury *or* considered by the Indiana Supreme Court because of their lack of jurisdiction and Evid. Rule 404(b) concerns.

Indiana Constitution, Art. 1, §13(a) states: In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, **in the county in which the offense shall have been committed...). [And],** The United States Constitution, Amendment VI states: In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury **of the state and district wherein the crime shall have been committed...")**

Baker raised the issue of jurisdiction concerning this evidence in his state post-conviction and in his Federal Habeas petition [4][and] the District Court had a special obligation to address it and correct it, however, neither court addressed it. See: *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938), ("The original purpose of the writ of habeas corpus, of course, was to allow relief where a defendant was convicted by a court that lacked jurisdiction"). *Id.* Baker's trial court and his jury as well as, the Indiana Supreme Court lacked the jurisdiction to entertain a conviction based on, outside the state of Indiana alleged crimes. And, questions about the court's jurisdiction cannot be waived. See: *Freytag v. Commissioner of Internal Revenue,* 501 U.S. 868, 111 S. Ct. 2631, 2648, 115 L. Ed. 2d 764 (1991); Jurisdiction can be raised at any time. *Kelly v. United States,* 29 F.3d 1107, 1112 (7th Cir. 1994).

This Honorable Court should correct the error here of the lower court's in this case not having the jurisdiction to entertain extrinsic evidence of out of State alleged crimes to convict Baker, either by jury or inappropriately by appellate ruling. See: *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986). ("...every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,...") *Id.* citing, *Mitchell v Maurer,* 293 US 237, 244, 79 L Ed 338, 55 S Ct 162 (1934).

[4] [See argument in Appellant Brief at DOC 13-17, p.p. 60-71; Habeas Traverse at DOC 21, p.32]

(5) Petitioner was charged with committing single incident crimes but with the evidence presented and the fatally ambiguous unanimity instruction his jury was given the jury ultimately convicted his of a continuous course of conduct crime which is a crime that does not exist in Indiana. This is apparent in the charging information's that alleged crimes committed over a three year period in counts I and II and in or about 2002 in count III. (App. Vol. 3(H),p.p.67-70) This is also apparent by the fact the Indiana Supreme Court felt it necessary to change the unanimity instruction to change the description of proof needed to convict a defendant of a single incident crime when presented with evidence to support conviction of a continuous course of conduct crimes. The Indiana Supreme Court in 2011 in Baker, encouraged the Indiana legislators to enact a continuous course of conduct crime but as of this date, Indiana still does not have one. ("However, the Indiana legislature {948 N.E.2d 1175} has not adopted a statute criminalizing an ongoing pattern of sexual abuse when the victim is unable to reconstruct the specific circumstances of any one incident. We encourage the General Assembly to consider this issue"). *Baker*, *supra*.

Baker was denied his constitutionally commanded due process of law because, ("It is a due process violation for the State to convict people of crimes that do not exist"). *Wilhoite v State*, 7 N.E.3d 350 (Ind.2014) citing *Funk v. State*, 714 N.E.2d 746, 749 (Ind. Ct. App. 1999). ("A person cannot constitutionally be convicted of a crime that does not exist at the time of the alleged conduct"). The *Funk* court held: "There can be no conviction for an offense not defined by statute. . . . Basic law pronounced by the Supreme Court is explicit; no combination of circumstances can justify the

conviction and imprisonment of a defendant of a non-existent offense. *Id. See also United States v. Stirone*, 361 U.S. 212, 217-18, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960).

(6) After acquiescing he was denied a unanimous verdict, because of a change in the unanimity instruction law three years after his trial, the Indiana Supreme Court waived the issue to him because, "Baker neither objected to the trial court's instruction nor offered an instruction of his own. This issue is waived". {948 N.E.2d 1179} Baker argues his case was a case of first impression in Indiana because it presented an entirely novel question of law for the decision of the court,[5] and the propriety of the unanimity instruction his jury was given was not governed by any existing Indiana precedent and the opinion in Baker ruling it was a fatally ambiguous instruction and replacing it was not filed until June 23, 2011 three years subsequent to Baker's 2008 trial. Trial counsel did not have a crystal ball ability to foretell the ruling and failed to make a relevant objection three years earlier. Counsel had no Indiana precedent to base an objection on.

Baker argues it is unfair to fault him for not objecting at trial to the unanimity instruction his jury was given because the act of ruling it was fatally ambiguous was an "unexpected occurrence", done at the very end of petitioner's proceedings, after all argument and briefing was completed, long after trial counsel had any opportunity to

[5] The general unanimity instruction Baker's jury was given was an accepted instruction in Indiana for decades.

object, creating an "exceptional circumstance", that no one—the trial court—the State—trial counsel, could have anticipated.

See: *United States v Higdon*, 418 F.3d 1136 (11th Cir. 2005) declining to find waiver because substantial change in law after briefing was completed constituted "exceptional circumstance" in which we will permit new issues to be raised. Citing *United States v. Serrano-Beauvaix*, 400 F.3d 50 (1st Cir.2005); *United States v. Vazquez-Rivera*, 407 F.3d 476, 487-88 (1st Cir. 2005); *United States v. Clifton*, 406 F.3d 1173, (10th Cir. 2005) (same).

And see: *Saunders v. Shaw*, 244 U.S. 317, 320, 61 L. Ed. 1163, 37 S. Ct. 638 (1917) ("But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. [244 US 320]; See: *Herndon v. Georgia,* 295 U.S. 441, 443-44, 55 S. Ct. 794, 79 L. Ed. 1530 (1935); As Justice Cardozo succinctly summarized in *Herndon:* "The settled doctrine is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected. " *Herndon*, 295 U.S. at 447.

(7) Baker argues that the procedural bar placed on him was also unfair because Indiana has not applied its rules concerning waiver consistently and thus this is not

the kind of evenhanded state procedural rule that can bar substantive review of the petition under *Hathorn v. Lovorn*, 457 U.S. 255, 262-63, 72 L. Ed. 2d 824, 102 S. Ct. 2421 (1982)). ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims.") *Id.* citing *Garcia v. Lewis,* 188 F.3d 71, 77 (2d Cir. 1999) (quoting *Hathorn; see also* Romano *v. Gibson*, 239 F.3d 1156, 1170 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 624 (2001). A state procedural rule is not entitled to deference by a federal habeas court if the rule is not "strictly or regularly followed." {457 U.S. 263}

Petitioner Baker cites below numerous Indiana cases to this court in which the Supreme Court and Court of Appeals of Indiana reviewed an instructional violation and other errors for the first time despite a failure to object at the time of error.

See: *Smylie v State*, 823 NE2d 679 (Ind. 2005), In *Smylie* the Indiana Supreme Court refused to find waiver of his Blakely issue because even though *Smylie* could have objected at trial under other grounds, *Blakely's* decision was a new rule that was sufficiently novel that it would not have been generally predicted, much less envisioned to invalidate preexisting Indiana law, therefore he had not forfeited his claim because, requiring a defendant or counsel to have prognosticated the outcome of *Blakely* before it was decided or of today's decision would be unjust. {823 NE2d 679} citing *US v Pree*, 384 F.3d 378 (7th Cir.2004).

And see: *Long v. State*, 448 N.E.2d 1103, 1983 Ind. App. LEXIS 2910 (Ind. Ct. App. 1983). Not finding waiver for not objecting to jury instruction because defendant did not have opportunity to object because court *sua sponte* gave instruction after jury

deliberations began which did not afford defendant an opportunity to object. *Id.* Accord: *Stephenson v State*, 864 NE2d 1022(Ind.2007); *Wrinkles v State*, 749 NE2d 1179 (Ind.2001); *Fulmer v State*, 523 NE2d 754, 757-58 (Ind.1988); *Sada v State*, 706 NE2d 192,199(Ind. Ct. App. 1999); *Wieland v State*, 848 NE2d 679 (Ind. Ct. App. 2006), trans.denied.; *Scuro v. State*, 849 N.E.2d 682, 688-89 (Ind. Ct. App. 2006) (Scuro raised no objection at trial to either the verdict forms or the verdict but the issue was addressed and a conviction was vacated because...it was possible that the jury's verdict . . . was not unanimous."). *Id.*

But in contrast see: Indiana cases such as *Mitchell v State*, 726 NE2d 1228, 1241 (Ind.2000)("[A] defendant who fails to object to an instruction at trial waives the any challenge on appeal"); *Ortiz v State*, 766 NE2d 370, 375(Ind.2002)("[f]ailure to tender an instruction results in waived of the issue for review"). The contrast here shows the issue is debatable enough to warrant a certificate of appealability. See: *Jones v Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011). (``When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine"). *Id.* Accord, *Wolff v. United States*, 135 S. CT. 2647, 192 LED2D 948, 576 U.S. 1071 (2015). That principle applies here given the divided decision in the Indiana cases above.

Other unaddressed relevant arguments Baker's has made throughout his collateral attack on his conviction are "Due Process" and "Equal Protection" violations. Baker also argued this issue also was a violation of the Equal Protection Clause of the 14th Amendment and Art. 1. §23 of the Indiana Constitution [Doc. 13-

19,p.p.26,27,29], and trial counsel ineffectiveness should be reviewed under the Cronic analysis[6] [Doc. 13-19,p.28; Doc. 21,p.p.21,26,30,31] and that direct appeal counsel was ineffective for not seeking a writ of certiorari on this unanimity issue directly after Baker's direct appeal decision.[Doc. 13-17,p.p.17,64,66; Doc. 13-20,p.p.17,18].

Baker has been diligent in his efforts to obtain a C.O.A. for his unanimity (Question One herein) and inadequate voir dire issues (Question Three herein). He brought these issues on direct appeal thur to the Seventh Circuit and on Rehearing En Banc in the district Court, as well as the United States Court of Appeals for the Seventh Circuit, but theses courts all remain silent on the issues of a C.O.A. as to these issues.

This Court has the authority to, and should, issue a C.O.A. as to all three of Baker's issues argued herein. See: *Ayestas v Davis*, 138 S. Ct. 1080 (2018), "We may review the denial of a COA by the lower courts. See, *e.g.*, *Miller-El* v. *Cockrell*, 537 U. S. 322, 326-327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). When the lower courts deny a COA and we conclude that their reason for doing so was flawed, we may reverse and remand so that the correct legal standard may be applied. See *Slack* v. *McDaniel*, 529 U. S. 473, 485-486, 489-490, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

[6] United States v. Cronic,466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)

QUESTION TWO ARGUMENT:

[Ex Post Facto Violation]

The Seventh Circuit decision in the case at bar concerning the retro-activeness of Indiana Code § 35-34-1-5 (2007) is in direct conflict with their own past decision. Moreover, Circuit Judge Wood who entered the decision in Baker, is in direct conflict with her own past words. In *Jones v Zatecky*, 917 F.3d 578, 580 (2019), at f.n.1 the United States Court of Appeals for The Seventh Circuit by *Chief Judge* Wood joined by Circuit Judges *Manion* and *Rovner* held that: "amended *Ind. Code 35-34-1-5 (2007)*) "is not retroactive". *Id.*

Additionally, in *Jones* above the Court quoted from *Jones* 2005 case and unpublished Indiana Court of Appeals November 8, 2007 decision that his trial court was in error for allowing an untimely amendment adding a new charge just nine (9) days after his omnibus date[7] based on *Haak v. State*, 695 N.E.2d 944, 951 (Ind. 1998) and *Fajardo v State*, 859 NE2d 1201, 1207(Ind.2007) but denied him relief because his trial attorney had failed to object. Petitioner Baker's trial attorney filed a written objection immediately after the State sought permission to amend.[8] *Jones* committed his offense on August 17, 2005 and the Indiana Court of Appeals noted in

[7] Baker's late amendment violation was made six months after his omnibus date.

[8] [ECF 21-2,p.p.27-30]

foot note 2 that: because Jones committed his offence before the legislature amended I.C. § 35-34-1-5 in 2007, our review is based on the old statute.

Baker's charging information alleged he committed his crimes in 2002 and 2003. When Baker was charged, *Indiana Criminal Code § 35-34-1-5 (1993)*[9] was the controlling statute governing substantive amendments to a defendants charges, mandating they were only allowed before a certain date, (30) days before the omnibus date. This issue boils down to whether or not the revised version of Indiana Code §35-34-1-5 has retroactive reach or not. The State claims the revision of the statute is just a procedural change in the law. However, this is not the end-all to the issue. See: *Collins v. Youngblood,* 497 U.S. 37, 46, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990) ("[S]imply by labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause."). *Id.*

First of all, when the Indiana Legislator revised the statute in 2007, they made it "EFFECTIVE UPON PASSAGE"[10] which was on May 7, 2007. Moreover, I.C. §35-34-1-5 was amended by Indiana Senate Bill 45 and in the Conference Committee Report it was written the revision became [EFFECTIVE UPON PASSAGE]; July 1, 2007[11]. Petitioner Baker argues that the Indiana Legislator's did not specify in the body of the revised law that it was to be applied retroactively, so it could only be applied prospectively.

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[9] Amended on May 7, 2007.
[10] (Appendix Vol. One. (F), page 63).

[11] (Appendix Vol. One. (F), page 71).

Whether a statutory provision applies retroactively is a legal question, which we review de novo. See: *Faiz-Mohammad v. Ashcroft*, 395 F.3d 799, 801 (7th Cir. 2005). We follow the guidelines established by the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), to determine whether a statutory provision is retroactive. *Id.*

First, we must ascertain whether Congress has spoken with the "requisite clarity" as to whether the statute should apply retroactively. *INS v. St. Cyr*, 533 U.S. 289, 316, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001); *see also Landgraf*, 511 U.S. at 272-73 ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."). If the intent is clear, "the court and the agency must give effect to the unambiguously expressed will of Congress." *Flores-Leon v. INS*, 272 F.3d 433, 438 (7th Cir. 2001).

Second, if the statute is silent as to whether a particular provision is retroactive, we must consider whether applying the statutory provision retroactively "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280; *see also Jideonwo v. INS*, 224 F.3d 692, 698 (7th Cir. 2000).

The Indiana legislators were not silent about the effects of their revision, the legislators stated with bold clarity (*ALL CAPS*), **[EFFECTIVE UPON PASSAGE]** And, as the Indiana Supreme Court has stated, "nothing may be read into a statute which is not within the manifest intention of the legislature as ascertained from the

plain and obvious meaning of the words of the statute." *Indiana Civil Rights Comm'n v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943, 946 (Ind. 2002). Retroactive reach cannot be found in the statute.

When making a decision whether to apply a revised statute retroactively the United States Supreme Court in *Landgraf*, specifically, instructs an inquiring court to ask, in part, whether the proposed application "{would impair} rights a party possessed when he acted, ..." 511 U.S. at 280; See: *Warner v State*, 265 Ind. 262, 354 NE2d 178, 183 (1976) "The legislatures may proscribe altogether different modes of procedure, but they may not, in doing so, dispense with any of 'those substantial protections with which the existing law surrounds the person accused of crime.'" *Id.* citing *Thompson v Utah*, (1898) 170 U.S. 343, 352, 18 S.Ct. 620, 42 L.Ed. 1061." (Emphasis added)

The application of the revised statute [did] impair rights a Baker possessed when he allegedly acted in 2003. *Indiana Code § 35-36-8-1(d)* dictates that once the omnibus date is set, it remains the omnibus date for the case until final disposition.

Baker's convictions became final on December 6, 2011. Baker's omnibus date of December 18, 2006 was still in effect, controlling the States authority to make amendments. By the law, (I.C. § 35-34-1-5 (1993)), after November 18, 2006, thirty days prior to Baker's omnibus date, no amendments to Baker's charges were legally allowed. Baker's charges were amended on July 31, 2007.

For a period of nearly six months, Baker had the assurance that no amendments could be made by the State, then suddenly this already expired deadline

was magically declared irrelevant and the State got to amend the charges over objection, adding a third count and greatly expanding the time periods alleged in Counts I and II from a two month period to nearly a three year period. This total erosion of the safeguards gained by Baker under the previous version of the statute and then lost by the amendment of the statute is a violation of the ex post facto provisions.

Moreover, Baker's gained safeguards weighed against whether or not to accept the State's plea offers. After 30 days before his omnibus date (November 18, 2006) Baker had the assurance no new charges or substantive changes could be made to his current charges and therefore, his defenses mounted against a possible acquittal at that time would have been a huge factor on whether or not to accept a plea offer. [12]At Baker's post-conviction hearing the State was adamant that plea negotiations took place before the first trial in June of 2007; and even produced a draft of a plea offer made before the first trial on March of 2007. The State said the offer was presented to Baker and his first trial counsel. [ECF 21-9, p.p.52-57]

Applying revised statutes which effectively enlarges the limitations period, does not violate the *ex post facto* clause so long as the statute is passed before the given prosecution is barred. *Stogner v. California*, 539 U.S. 607, 618, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003); *United States v. Elrod*, 682 F.2d 688, 689 (7th Cir. 1982). *Stogner* distinguished between statutes that extend the statute of limitations, and

[12] This is especially true since Baker's first trial ended in a hung-jury mistrial because the jurors could not agree on a verdict.

those that attempt to revive them. "Even where courts have upheld extensions of unexpired statutes of limitations * * *, they have consistently distinguished situations where limitations periods have expired." * * * *Id.*

Perhaps, the Indiana legislator's did not state their new law was to be applied retroactively because although they did have the authority to amend the law, they did not have the authority to overrule the Indiana Supreme Court's ruling in *Fajardo.* The Indiana Supreme Court in *Fajardo* revisited the issue of untimely amendments of substance. The Court concluded that amendments of substance (Adding a new charge is an amendment of substance) to a charging information could not be made after thirty days prior to the omnibus date, regardless of a lack of prejudice. *Id.* at 1208; *P.L. 164-1993; Ind. Code 35-34-1-5(b) (1993).*

The Indiana Supreme Court's mandatory ruling in *Fajardo* is not allowed to be overridden by a revision to the statute by the Indiana legislators. The Indiana General Assembly is not allowed to retroactively void a court order by statute because in doing so, it violates the Indiana Constitution's Separation of Powers provision by overstepping and taking away the judicial power of the Indiana Supreme Court.

On the other hand, when the judicial branch ignores the clear meaning of the text in a statute it is calling the legislator's words absurd. Indeed, it violates the absurdity doctrine to allow the Indiana court's to read retroactivity in the revised version of I.C.§ 35-34-1-5 (2007) when it clearly and unequivocally states in bold all caps lettering [EFFECTIVE UPON PASSAGE] which was on July 1, 2007. The Indiana Supreme Court has not abolished the absurdity doctrine, which the courts

consistently apply since the early days of Indiana's 1851 Constitution. See: Calvin v State, 87 N.E.3d 474 (Ind. 2017) ("Criminal statutes may not be enlarged beyond the fair meaning of the language used..."). The absurdity doctrine implicates the bedrock separation-of-powers principles and thus must be carefully applied-especially to plain-meaning statutes with broad application. The constitution empowers the legislative branch to make law; the judicial branch to decide cases. *Id.*

Letting the judicial branch ignore the plain meaning of the text in the revised version of I.C. § 35-34-1-5 (2007) which clearly and unequivocally states in bold all caps lettering [EFFECTIVE UPON PASSAGE] would be to call the explicit plain meaning text absurd and tells the Indiana legislature that it may not legislate in that way even if it uses the clearest terms; it invokes the serious judicial act of declaring certain matters beyond the reach of the political branches. Separation of powers is explicit in our Constitution. Ind. Const. art. 3, 1. And the power to legislate "is vested exclusively in the Legislature under Article 4, Section 1 of the Indiana Constitution".

The courts cannot venture upon the dangerous path of judicial legislation to supply omission or remedy defects in matters committed to a co-ordinate branch of the government. {87 N.E.3d 474}. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch. See *Mistretta v United States*, 488 US 361, 382, 102 L Ed 2d 714, 109 S Ct 647 (1989).

Moreover, the statute, I.C. § 35-34-1-5 is not constitutionally based and it does not address itself to a specific punishment. The body of United States Supreme Court

jurisprudence clarifies that a rule must be constitutionally based before it may be considered for retroactive application on collateral review. *See, e.g., Saffle v. Parks,* 494 U.S. 484, 488, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990). The language of Indiana Code §35-34-1-5 was not compelled by any Indiana or federal constitutional provision.

Indeed the Indiana Supreme Court in *Fajardo* did not mention any constitutional provisions, much less rely on one when discussing the provisions of I.C.§35-34-1-5(1993) and, neither did the Indiana Legislators when revising it, (Appendix Vol. One. (F), page 63, 71). Therefore the revised version of I.C.§35-34-1-5(2007) simply does not have retroactive reach and does not apply to Baker and his argument that the version of I.C.§35-34-1-5(1993) that was in effect when he allegedly committed his crimes still applies.

Moreover, revised IC§ 35-34-1-5 (2007) does not address itself to a specific class of defendants (defined by their status or offense) and, it does not address itself to a specific punishment. *See Lambrix v. Singletary,* 520 U.S. 518, 137 L. Ed. 2d 771, 117 S. Ct. 1517, 1531 (1997) (quoting *Saffle v. Parks,* 494 U.S. 484, 495, 108 L. Ed. 2d 415, 110 S. Ct. 1257 (1990)) (rule at issue is not entitled to retroactive effect because it "'neither decriminalizes a class of conduct nor prohibits the imposition of *capital punishment* on a particular class of persons'" (emphasis supplied)); *Butler v. McKellar,* 494 U.S. 407, 415, 108 L. Ed. 2d 347, 110 S. Ct. 1212 (1990) (rule at issue not entitled to retroactive effect because it did not address any categorical guarantees

accorded by the Constitution such as a prohibition on the imposition of a *particular punishment* on a certain class of offenders). *Id.*

Moreover, the United States Supreme Court has held that a new procedural rule will apply retroactively on federal collateral review only if the new rule constitutes a ``watershed" rule of criminal procedure. *Teague* v. *Lane*, 489 U. S. 288, 311, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (plurality opinion). And in the 32 years since *Teague*, the United States Supreme Court has *never* found that any new procedural rule actually satisfies the purported exception. *Edwards v Vannoy*, 141 S. Ct. 1547; 209 L. Ed. 2d 651, 659-660 (2021) . The revision to I.C. § 35-34-1-5 in 2007 by the Indiana Legislators may arguably be a procedural rule change but, certainly it was not a "watershed" rule that applies retroactively.

Indiana courts are divided on this issue. See the following all applying Fajardo's decision to defendants who committed their crimes before Fajardo or the amendment to I.C. 35-34-1-5. *Fields v State*, 888 NE2d 304, 310 (Ind. App. Ct. 2008); *Roush v. State*, 875 N.E.2d 801 (Ind. Ct. App. 2007); *State v. O'Grady,* 876 N.E.2d 763, 765 n.1 (Ind. Ct. App. 2007)(applying the statute in effect at the time of the offense); *Fowler v. State,* 878 N.E.2d 889, 892-94 (Ind. Ct. App. 2008); *Baber v. State,* 870 N.E.2d 486, 491-93 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 221 (Ind. 2007); *Absher* at 353-54. (Each applying *Fajardo* where offense was committed prior to date *Fajardo* was handed down). (applying the statute in effect at the time of the

offense). Fields held: "Our general rule is that the law in effect at the time the crime was committed is controlling". *Id.* citing *Walsman v. State, 855 N.E.2d 645,* 650 (Ind. Ct. App. 2006), *reh'g denied.*[13] Not to treat Baker's case like Fields, Roush or any of the above was an abuse of discretion by the former reviewing courts and is in direct conflict with the basic principle that like case should be treated alike. {546 U.S. 139}

The amendment adding Count three prejudiced Baker because without this evidence in his first trial the jury could not reach agreement after nineteen hours of deliberating, [App. Vol. 1,p. 82, 6-07 ; 6-08 -2007 entry's] but with this evidence they returned a guilty verdict in near record time, three hours. [DOC 21-6, p. 109] The state sought to admit the evidence presented in Count three in Baker first trial but was denied because of R. 404(b) concerns. See: (Appendix Vol. One. (F), page 77, 78). See: *Johnson v State,* 740 NE2d 118 (Ind.2001) where the Indiana Supreme Court concluded that the State exceeded the boundaries of fair play by dismissing and refiling charges to evade an adverse trial court ruling to get a second shot at offering 404(b) evidence.

Baker deserves to have this Court issue a C.O.A. as to this issue and or vacate his convictions. If Court III is vacated, so should Counts I and II because without the evidence of Count III no conviction was rendered in Baker's first trial.

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[13] Accord: *Hughes Aircraft Co. v United States ex rel. Schumer,* 520 US 939, 138 L Ed 2d 135, 117 S Ct 1871 (1997); *Landgraf v USI Film Products,* 511 US 244, 128 L Ed 2d 229, 114 S Ct 1483 (1994) (quoting *Kaiser Aluminum & Chemical Corp. v Bonjorno,* 494 US 827, 855, 108 L Ed 2d 842, 110 S Ct 1570 (1990) (Scalia, J., concurring)).

QUESTION THREE ARGUMENT:

Baker was denied his constitutional right to a fair trial due to a denial of an adequate *voir dire* to identify unqualified jurors on two separate occasions. **[First]** after trial counsel filed a pre-trial Motion for a Test Jury to Determine Prejudice due to Pre-Trial Publicity.

1. Prior to trial, Baker's trial counsel informed the Court of the possibility of jury bias due to prejudicial media coverage with a Motion for a Test Jury to Determine Prejudice due to Pre-Trial Publicity; [Doc. 21-8,p.p.81,82], Respondent doesn't deny;

2. The newspaper articles counsel was worried about included Baker's booking photo, information about Baker's first and second trials including his prior criminal history and punishment possibilities. [Doc. 21-8,p.p.83-89], Respondent doesn't deny;

3. The trial court never addressed the issue and never questioned one juror as to whether or not they had read or heard any of the prejudicial media coverage and if so if they could still render a bias free verdict on the evidence alone; [DOC 21-4, p.p. 1-200 to DOC 21-5,p.p.1-58], Respondent doesn't deny.

The courts failure here is extremely problematic because Baker resided in; and his trial was held in; and his jury was selected from, a small Indiana town in a county of only 45,000, with only one newspaper and with a prosecutor who admitted she never had a jury in which no one knew her or her husband. (See DOC. 21-9, p. 9).

To inform the jury of prior crimes of a defendant is, in the view of the Supreme Court, so improper and so prejudicial that a mistrial must be declared, *Marshall v. United States, 1959, 360 U.S. 310,* 79 S. Ct. 1171, 3 L. Ed. 2d 1250, see, *United States v. Riley,* 621 F.3d 312, 336 (3d Cir. 2010), reversing because a witness twice mentioned that he had met the defendant in a work release program, which impermissibly informed the jury that the defendant had been convicted of a previous crime.

[Second] At the beginning of the fifth day of Baker's five day trial it was brought to the Court's attention that one of Baker's jurors (Juror # 12) had an undisclosed friendship with the prosecutor's husband that he failed to reveal during initial voir and they had an unauthorized out-of-court meeting and communication during a lunch break in the trial. [Doc. 21-6, p.p.15-18]

The record reveals that the trial court never questioned the juror or the Prosecutor's husband. Instead the Court made its determination not to interrogate anyone based entirely on the speculations of the prosecutor's opinion of her husband's opinion of juror # 12's opinion. The prosecutor's opinions was hearsay evidence which has no place in a criminal trial and should not have been legally considered by the

trial judge in assessing whether an investigation into juror misconduct and possible bias was needed.

In *Lindsey v State,* (1973), 260 Ind.351,295 NE2d 819, which is still the law in Indiana concerning both the pre-trial publicity issue and the juror misconduct issue the Indiana Supreme Court held that if a trial court is made aware of suspected jury taint, the defendant is entitled to, "as a matter of law", to have the jury polled and if the trial court fails to do so, it commits an abuse of discretion"). *Id.*

The *Lindsey* Court adopted their standards by following the standards prescribed by the Seventh Circuit Court of Appeals in the following cases: *Margoles v United States,* (1969),407 F.2d 727; *United States v Largo,*(1965),346 F.2d 253. ("In essence these cases hold that whenever prejudicial publicity is brought to the attention of the Court, *at a minimum it must,* at that time, interrogate the jury to determine its exposure, and that jurors acknowledging exposure should be examined individually to determine the extent of such exposure and the likelihood of prejudice resulting there from").

In, *U.S. v Warner,* 498 F.3d 666, 679-682 (7th Cir. 2007) the United States Court of Appeals held in relevant parts: courts "retain . . . substantial discretion over the determination of whether the prejudice arising from the unauthorized contact is rebutted or harmless." ... "The relevant question is thus whether the court abused its discretion in making that determination"... "We first consider whether the court applied the proper legal standard for its inquiry. A court's failure to use the proper legal standard is an abuse of discretion". "A court also abuses its discretion if the

record contains no evidence on which the court could have relied or if its findings of fact are clearly erroneous"..." In, *United States v. Sanders*, 962 F.2d 660, 669 (7th Cir. 1992), we suggested a nonexclusive list of considerations that throw light on the question of prejudice. These factors are, [1] the extent and nature of the unauthorized contact, [2] the power of curative instructions, and [3] the responses of the jury." {498 F.3d 681-82}

Baker argues that his trial court abused its discretion in making a determination that the juror, and the prosecutor's husbands friendship and unauthorized conduct during trial created no prejudice to Baker and to the integrity of the trial or that no juror was prejudiced by pre-trial publicity, because it applied no legal standard in making its determination, just the opinions of the prosecutor and without any investigation of the parties involved. Therefore, the record contains no evidence to support its findings that ignorance is bliss. Therefore, it is impossible to follow the nonexclusive list prescribed in *Sanders*. Because, [1] without questioning the juror or the prosecutor's husband or any juror concerning the pre-trial publicity, no one knows (the extent and nature of the unauthorized contact) and [2] the court did not give any curative instructions, and [3] therefore there are no responses from the jury to determine if prejudice existed.

In, *United States v. Guy*, 924 F.2d 702, 707 (7th Cir. 1991), Chief Judge Bauer wrote: ("In *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, this court established the standard for evaluating a challenge to the *voir dire* examination of the district court. In order for us to sustain *Guy's* contention, it is not necessary for

him to show that members of the jury were in fact prejudiced. *Id.* at 367. Instead, we focus exclusively on "whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present." *Id. Guy* held : ("When the court in conducting voir dire does not ask questions sufficient to discover bias if it existed defendants do not have to show the jurors were in fact prejudiced, instead, "we focus exclusively on "whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present." *Id.* cited with approval by *United States v Hill,* 552 F.3d 541at 546-47(7th Cir. 2008); *Chandler v Florida,* 449 US 560 (1981), holding defendant has right to adequately determine prejudice from pre-trial publicity. {449 U.S. 575}.

Baker's trial court's perfunctory investigation and decision that no bias existed due to pre-trial publicity and juror, Mr. Timmerman's conduct was an abuse of discretion and is contrary to *Guy* above and all other relevant precedent above.

Baker tried to investigate the issue but was denied in all his efforts. First he tried to obtain the juror's questionaries' but was denied. [Doc. 21-8,p.p.8-11] Then he tried to question them be interrogatories or affidavits, and subpoenas but was denied. [Doc. 21-8, p.p. 12-60; 61-63; 75-80; 90-123] Baker even showed that had he knew of Juror # 12's friendship with the prosecutor's husband he would have struck him from the jury by showing he had struck other potential jurors who admitted they knew the prosecutor or her husband. [Doc. 13-17,p.p.27-28; Doc. 21-2,p.p. 54-79] Now his claims are being denied because he did not prove his claims and show prejudice. [Doc. 27,p.p.12-13]. Baker was denied due process and a fair trial plus a fair opportunity to

create a record to prove his claims and this Court should grant this writ, and issue a C.O.A. and remand for remedy proper in the premises.

See: *Williams v Taylor*, 120 SCT1479, 146 LED2D 435, 529 US 420 (2000) in a case involving a claim of (1) juror misconduct for failing to reveal on voir dire improper relationship with the prosecutor and a state witness-defendant was not barred from obtaining an evidentiary hearing on his claim, because the prisoner has met his burden of showing that he was diligent in his efforts to develop the facts supporting those two claims. *Id.*

Baker has shown he has been diligent in his efforts to investigate his claims and the Indiana trial post-conviction court, the Indiana Court of Appeals and the District Court all should have held a specific hearing at which Baker might have been able to create a record to prove his claims. Instead the post-conviction court blocked all his efforts and then denied his claims because he did not create the record to prove them. Moreover, the Indiana Court of Appeals and the District Court mirrored each other and faulted Baker for not proving his claims. Baker was also denied his requests to subpoena his jurors, his first and second trial counsel's, his trial judge, his prosecutor or her husband to his post-conviction evidentiary hearing to question them under oath to prove his claims.

The above Court should have assisted Baker in his efforts to either prove or disprove his claims. This is especially true in Baker's case because Juror # 12 never was questioned by the court or offered any explanations for his failure to reveal that he was a friend of the prosecutor's husband or that they had met and conversed

during the trial, therefore the omission by Juror # 12 showed implied bias and disclosed the need for a hearing at which Baker might have been able to show that the juror was not impartial The Williams Court further held "if the prisoner has made a reasonable effort to discover the claims to commence or continue state proceedings, 2254(e)(2) will not bar him from developing them in federal court". [529 US 444] ("[T]he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias"). {449 U.S. 575}

CONCLUSION

Petitioner prays this Honorable Court will liberally construe his pleadings in the spirit of *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999); *Estelle v. Gamble*, 429 U.S.97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Petitioner Baker deserves to have this writ granted on all three issue herein because as argued above, the decisions of the Indiana appellate Courts and the District Court and the Seventh Circuit Court of Appeals all are in conflict with other state and circuit courts as well as this court and the issue presented herein are of extreme importance to this petitioner and all other persons similarly situated. Baker deserves a new and fair trial, at the very least, this Court should issue C.O.A.'s concerning all three questions/claims argued herein.

Respectfully submitted this 10TH day of March, 2023.

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